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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1998

CHIEF WARRANT OFFICER ALLAN L. TURNER, *Petitioner*,
v.
UNITED STATES OF AMERICA, *Respondent*.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

Congress has adopted or enacted similar requirements for waiver of the right to trial by jury for federal and military criminal defendants. The question presented is whether a number of the federal Courts of Appeals are correct that, in order to be effective, a waiver to trial by jury must be personally expressed by the defendant.

II

Where Congress has explicitly recognized the critical protections afforded in the right to trial at court-martial by military jury by requiring a military defendant to expressly invoke a waiver of the right, in writing or orally on the record, is a less-than-strict compliance with this waiver rule a jurisdictional defect?

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Petition for a Writ of Certiorari to the
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PETITION FOR A WRIT OF CERTIORARI

Chief Warrant Officer Allan L. Turner, U.S. Navy, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces.

OPINIONS BELOW

The opinion of the Court of Appeals for the Armed Forces (Appendix A, *infra*) is reported at 47 M.J. 348 (1997). The opinion of the Navy-Marine Corps Court of Criminal Appeals (Appendix B, *infra*) is reported at 45 M.J. 531 (N.M.Ct.Crim.App. 1996).

JURISDICTION

This Court has jurisdiction to grant this petition for writ of certiorari to the United States Court of Appeals for the Armed Forces ("CAAF"), 28 U.S.C. § 1259(2), and Petitioner respectfully requests that this Court waive its rule regarding the time limit for filing such petition, because any delay is through no fault of petitioner.

The CAAF reviewed this case upon certification by the Judge Advocate General (JAG) of the Navy. 10 U.S.C. § 867(a)(2). On September 30, 1997, the CAAF reversed the decision of the Navy-Marine Corps Court of Criminal Appeals, which had held that the court-martial lacked jurisdiction to try petitioner. Thinking his case was not ripe for Supreme Court review due to the remand, petitioner awaited consideration of the remanded issues to appeal the CAAF's decision to this Court. On March 19, 1998, the Navy-Marine Corps court ruled against petitioner on the remanded issues, and, after petitioner sought CAAF review, the CAAF denied petitioner's petition for review on September 23, 1998.

The CAAF has a longstanding policy enabling petitioners an avenue to this Court after having once granted review. The CAAF Rules provide that, where a first petition for review has been granted and the case remanded to the service court, the Court "shall treat the prior grant as good cause to grant review of [a] subsequent petition." United States v. Wynn, 26 M.J. 405, 406 (C.M.A. 1988). This policy of automatically granting a second petition is specifically designed to ensure that an appellant's "right to approach the Supreme Court of the United States would not be lost by the [Court's earlier] remand." United States v. Boudreaux, 28 M.J. 181, n. 4 (C.M.A. 1989). The CAAF has traditionally viewed its policy as "implementing the intent of Congress when it authorized Supreme Court review of cases in which we had granted the petition for review." Wynn, 26 M.J, at 406.

Congress has also expressly provided for Supreme Court review in "cases certified to the Court of Appeals for the Armed Forces by the Judge Advocate General under section 867(a)(2) of title 10." 28 U.S.C. §1259(2). Petitioner's attorneys had recognized that the same concerns for "economy, efficiency, and orderly administration of the appellate process" which are the basis for the automatic grant policy upon a second petition (Boudreaux, 28 M.J. at n. 4), are also served by granting review of a petition following remand of a certified case.

Because petitioner's attorneys believed the case was not ripe for review upon remand, and could not discern any distinction between an appellant whose case is remanded following certification and an appellant whose case is remanded following a granted petition, they determined that a petition to this Court was not appropriate until after remand and subsequent review by the CAAF. Such an approach also serves judicial economy (if Supreme Court review were delayed until after the military courts had fully reviewed all of the issues petitioner had raised below). Through no fault of petitioner, his attorneys did not realize their error in time to timely file a petition for reconsideration with the CAAF; however, they did point out to CAAF that its decision in this case created disparate and unequal treatment of appellants whose cases are remanded following certification by a service's JAG. On January 14, 1999, the CAAF denied petitioner's motion for leave to file petition for reconsideration out of time.

Petitioner has never wavered in his desire to approach this Court for review of the CAAF's decision on the certified issues, but has relied on the advice of his attorneys when he failed to approach this Court for review of the CAAF's decision immediately after it was issued. Through no fault of his own, petitioner was misinformed that he would not lose his right to approach this Court by waiting to petition for Supreme

Court review until after the Navy-Marine Corps Court completed its review on remand.

Petitioner respectfully requests that this petition be entertained on the merits. Rule 13.1 and 13.3 are not jurisdictional as applied to case. *See* Schacht v.United States, 398 U.S. 58, 63-64 (1970) (dealing with the predecessor to Rule 13). *See also* 28 U.S.C. §2101 (g) (Congress has left the time for application for a writ of certiorari to review a CAAF decision in this Court's discretion); Jordan v. United States, 498 U.S. 1009 (1990) (this Court granted certiorari to a military defendant despite a delay of more than eighteen months in the filing of his petition). Although this petition is filed out of time under Rules 13.1 and 13.3 of the Rules of this Court, such a defect is not jurisdictional. Moreover, this Court should waive its own rules in this case, because a misunderstanding of this Court's Rules for review of a certified CAAF case, and misplaced reliance by petitioner's attorneys on the CAAF's long-standing policy preserving a military petitioner's right to seek review by this Court, are through no neglect or fault by petitioner.

STATUTES AND RULES INVOLVED

Article 16, Uniform Code of Military Justice, 10 U.S.C. § 816 provides, in pertinent part:

> The three kinds of courts-martial in each of the armed forces are—
>
> (1) general courts-martial, consisting of—
>
> (A) a military judge and not less than five members; or
>
> (B) only a military judge, if before the court is assembled the accused,

knowing the identity of the military judge and after consultation with defense counsel, requests orally on the record or in writing a court composed only of a military judge and the military judge approves; . . . .

Rule for Courts-Marital 903 provides, in pertinent part:

(b)(2) *Request for trial by military judge alone.* A request for trial by military judge alone shall be in writing and signed by the accused or shall be made orally on the record.

* * *

(c)(2) *Request for military judge alone.* Upon receipt of a timely request for trial by military judge alone the military judge shall:

(A) Ascertain whether the accused has consulted with defense counsel and has been informed of the identity of the military judge and of the right to trial by members; and

(B) Approve or disapprove the request, in the military judge's discretion.

Federal Rule of Criminal Procedure (Fed.R.Crim.P.) 23 provides, in pertinent part:

(a) **Trial by jury**. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

STATEMENT OF THE CASE

Petitioner's general court-martial was conducted in three sessions over the course of a two-month period. At the initial session on November 4, 1994, the military judge advised petitioner of his various rights including the right to trial by jury and the right to request to be tried, instead, by military judge alone. (R. 2-5). Prior to arraignment, the military judge granted the defense counsel's request that this forum selection be deferred to a later session. (R. 5).

The second session of trial was conducted on December 7, 1994. (R. 8-39). At this session, the military judge ruled against the defense on several important motions, including a motion to dismiss based on the expiration of the statute of limitations. (R. 12-13). The matter of forum selection was not addressed at this session.

Trial on the merits began on January 9, 1995. (R. 40). Near the beginning of those proceedings, the following colloquy took place:

> Military Judge ("MJ"): Any other matters to add to the record at this time?
>
> Trial Counsel ("TC"): Sir, I believe the defense has provided a written request for judge alone. Would you like to add that to the record or orally take care of that?
>
> MJ: We can add that to the record.
>
> TC: Judge, we can take care of that orally, if you prefer.
>
> MJ: I have it, and I'll mark that Appellate Exhibit VII (sic). Any other documents?

TC: No further documents.

Defense Counsel ("DC"): No, sir.

MJ: Lieutenant Seacrist, I take it from this request that the decision has been made to go judge alone?

DC: Yes, sir.

(R. 40). Appellate Exhibit VIII[1] is a memorandum dated January 3, 1995 (six days before trial) and is addressed to the trial counsel. This memorandum, signed only by petitioner's defense counsel, reads as follows:

> Please accept this as notice that the accused has authorized me to state that he will select judge-alone as the forum for the aforementioned case. CWO2 Turner has been advised of his rights to trial by members, and has knowingly, voluntarily and intelligently waived trial by members.

The military judge tried, convicted and sentenced petitioner.

On appeal, the Navy-Marine Corps Court of Criminal Appeals set aside the findings and the sentence, determining that the military judge lacked jurisdiction under 10 U.S.C. § 816, Article 16, Uniform Code of Military Justice (hereinafter, "UCMJ") to conduct the court-martial. (Appendix B, *infra* at pp. 20a-21a.) The court held that the statutory language "unambiguously requires the accused to personally

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[1] The military judge erroneously referred to this request as Appellate Exhibit VII. The request is appended to the record as Appellate Exhibit VIII.

select trial by military judge alone, whether it be 'orally on the record or in writing'". (Appendix B, *infra* at p. 12a.)

Thereafter, the Navy Judge Advocate General, pursuant to 10 U.S.C. § 867(a)(2), certified the issue for review to the United States Court of Appeals for the Armed Forces. On September 30, 1997, that court reversed the Navy-Marine Corps Court, holding that "while there has been a violation of Article 16, there has been substantial compliance in this case with that Article." (Appendix A, *infra* at p. 7a.) The court denied petitioner's timely petition for reconsideration on November 13, 1997. (Appendix C, *infra*.) The case was then remanded to the Navy-Marine Corps Court for review of issues raised by petitioner but left undecided in the Navy-Marine Corps Court's earlier decision.

On March 19, 1998, in an unpublished decision, the Navy-Marine Corps Court disposed of the remaining appellate issues, granting no relief to petitioner. Thereafter, on July 15, 1998, petitioner sought further review of the case before the United States Court of Appeals for the Armed Forces. That court denied his petition for further review on September 23, 1998. (Appendix D, *infra*.) On January 14, 1999, the Armed Forces Court denied petitioner's motion for leave to file petition for reconsideration out of time. (Appendix E, *infra*.)

REASONS FOR GRANTING THE PETITION

The decision of the United States Court of Appeals for the Armed Forces conflicts with the decisions of a majority of federal circuit courts faced with the same issue, rendering unequal treatment to military defendants. This split among the federal Courts of Appeals raises an important question of federal law that has not been, but should be, settled by this Court. Sup. Ct. R. 10(c). Moreover, the Armed Forces Court has

decided an important federal question in a way that conflicts with the established jurisprudence of this Court, and that ignores its own longstanding precedent. In determining that strict compliance with Congress's mandate for an express, personal waiver of the right to trial by jury is unnecessary to establish jurisdiction to trial by military judge alone, the court below has "so departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power". Sup. Ct. R. 10(a).

A. Resolution is Needed of the Conflict Among the Federal Courts of Appeals Over Whether a Waiver to Trial by Jury Must be Personally Made in Order to be Effective.

The right to trial by jury is an important right in any criminal justice system, and the waiver of this right one of the most critical decisions any accused can make. This Honorable Court has made this point clear:

> The purpose of the jury trial, as we noted in Duncan, is to prevent oppression by the Government. "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." [citation omitted] Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence.

Williams v. Florida, 399 U.S. 78, 98 (1970). The significance of the right to trial by jury requires an express and unequivocal request for a bench trial in order for a waiver of the right to be effective. Patton v. United States, 281 U.S. 276, 312 (1930) (expressing the requirement for the "express and intelligent consent of the defendant" to trial by judge alone).[2]

Article 16, UCMJ, 10 U.S.C. § 816, provides for general courts-martial composed of at least five jury or "court" members unless the military defendant "requests orally on the record or in writing a court composed only of a military judge." By dismissing Article 16's requirement for an express, *personal* waiver of the right to trial by jury, the decision below directly conflicts with decisions of the majority of its sister Courts of Appeals which have considered the question.

Waiver of the right to trial by jury in federal district courts is governed by Federal Rule of Criminal Procedure 23. Rule 23(a) provides, "Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government." Federal courts have generally required a strict adherence to Rule 23's prerequisites, which contain similar requirements to those imposed by Article 16, UCMJ.

In its discussion of prevailing federal practice, the court below cites to five federal circuit court cases in support of the proposition that failure to reduce to writing a request for a bench trial as required by Fed.R.Crim.P. 23(a) "is regarded as a nonjurisdictional procedural error." (Appendix A, *infra* at p. 6.) While these cases do hold that a *written* request is not a jurisdictional prerequisite, a majority of these federal circuit courts

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[2] As the court below recognized, the Patton decision served as "[p]art of the impetus for Article 16" of the UCMJ. Appendix A, *infra* at p. 6.

require that such requests be made *personally* by the defendant, either orally or in writing, before a judge-alone court obtains jurisdiction.

In the first case cited by the court below, United States v. Fisher, 912 F.2d 728 (4th Cir. 1990), *cert. denied* 500 U.S. 919 (1991), the Fourth Circuit found that a defendant's consent, given personally on the record (albeit in chambers) to trial by a jury composed of less than 12 members "satisfies the requirement that the defendant's consent be personal and express." 912 F.2d at 732.

The second case, United States v. Saadya, 750 F.2d 1419 (9th Cir. 1985), appears on point and its conclusion directly conflicts with the decision reached by the court below on the matter of jurisdictional error. In reversing the conviction rendered in a bench trial, the Ninth Circuit expressly rejected the government's argument that the failure of the record to contain a written waiver of the defendant's right to trial by jury or appellant's oral consent was merely a "technical violation". 750 F.2d at 1420. The court concluded that,

> A defendant may not effectively waive his right to a jury trial without meeting Rule 23's "in writing" requirement. The only exception is where the record clearly reflects that the defendant "personally gave express consent in open court, intelligently and knowingly."

Id. (quoting United States v. Reyes, 603 F.2d 69, 71 (9th Cir. 1979), wherein, *with facts similar to those presented by the instant case*, the court found an insufficient waiver where counsel spoke on behalf of the defendant). The Ninth Circuit court further held that the Rule's requirement for approval of the waiver by the judge was an absolute prerequisite to trial by judge alone. Id. at 1421 (citing this Court's decision in Patton).

Another of the cases cited by the court below, United States v. Ricks, 475 F.2d 1326, 1327 (D.C. Cir. 1973), stands for the proposition that a "knowing and express waiver by the defendant in open court" constitutes a sufficient Rule 23 waiver. See also United States v. David, 511 F.2d 355 (D.C. Cir. 1975) (remanded for new trial where judge's inquiry into waiver of right to jury trial deemed inadequate). Similarly, the court in Rogers v. United States, 319 F.2d 5 (7th Cir. 1963) (the last case cited by the court below), held a waiver sufficient only because the oral request for a bench trial was made personally by the defendant.

In a case not cited by the court below, the Tenth Circuit relied on the Ninth Circuit's Saadya decision in finding a written request for a bench trial signed only by the defendant's attorney was insufficient. United States v. Robertson, 45 F.3d 1423, 1430-33 (10th Cir. 1995). The Tenth Circuit found conclusive the absence of any indication in the record that the defendant personally understood her right to trial by jury and knowingly waived that right.

On the other hand, in United States v. Page, 661 F.2d 1080 (5th Cir. 1981), *cert. denied* 455 U.S. 1018 (1982) (one of the cases cited by the court below), the Fifth Circuit court held unequivocally that counsel's representations on the record constitute a sufficient waiver. That decision turned, however, on the fact that the waiver was made in the presence of the defendant who was "a highly educated and articulate" former university professor. Page, 661 F.2d at 1082. The Fifth Circuit has since declined to follow Page where the defendant was less educated. United States v. Mendez, 102 F.3d 126 (5th Cir. 1996) (defendant did not speak or understand English, and was from a poor, rural community in Columbia).

In two cases not cited by the court below, federal circuit courts have taken a slightly different tack when confronted with a *statutory* right to trial by jury on the

issue of criminal forfeitures. The Eleventh Circuit recognized Page's "invited error exception" as a "narrow one" to be applied to a bench trial conducted without a signed waiver only in an "extraordinary case". United States v. Garrett, 727 F.2d 1003, 1013 (11th Cir. 1984). The Eleventh Circuit remanded Garrett for an evidentiary hearing to allow the government the opportunity to attempt to prove the defendant's "knowledge and consent [to a bench trial], express or implied . . ."; failing that, a jury trial was in order. Id. Likewise the Seventh Circuit, in a case where the defendant's counsel invoked a waiver during an in-chambers conference with the judge, the court remanded the case to give the government the opportunity to prove a knowing and voluntary waiver. United States v. Robinson, 8 F.3d 418, 423-25 (7th Cir. 1993) (holding that statutory right to trial by jury on matter of criminal forfeitures requires a personal waiver by the defendant).

The decision rendered by the Court of Appeals for the Armed Forces in this case and the decision of the Fifth Circuit in Page are at odds with the standards applied in the Fourth, Seventh, Ninth, Tenth, and D.C. Circuits.[3] Additionally, courts in the Eleventh and

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[3] The court below did not attempt to espouse a military exigency which would require waivers of the right to trial by military court members to be reviewed any differently than waivers of the right to trial by jury are reviewed by civilian courts. No military necessity exists which requires military defendants to be treated differently than their civilian counterparts. Moreover, although the right to trial by jury in the military is a statutory right rather than a constitutional guarantee (see United States v. MacCulloch, 40 M.J. 236 (C.M.A. 1994), because the right to trial by jury is recognized as a crucial right --- whether conferred by the constitution or by statute --- courts have reviewed waiver of a statutory right to trial by jury under the same standards as those applied where the right is of a constitutional nature. See, e.g., Robinson, 8 F.3d 418, 421-22 (7th Cir. 1993) (in reviewing a waiver of the statutory right to jury trial on issue of criminal forfeitures, court concluded certain rights are so important that, even though statutorily created, they require a knowing and voluntary waiver).

Seventh Circuits have pursued a different remedy (remand for evidentiary hearing) where a statutory right to trial by jury was involved.

There exists a split among several of the federal circuits as to whether reversal is the appropriate remedy for a violation of waiver rules, with most of the circuits adhering to a strict compliance/jurisdictional defect interpretation. The Court of Appeals for the Armed Forces and the Fifth Circuit, however, have adopted a "substantial compliance" standard. Review by this Court is necessary to resolve the conflict on the important federal questions of what constitutes a sufficient personal waiver of the right to trial by jury and whether anything short of strict compliance with the waiver rules deprives a judge-alone court of jurisdiction to render a verdict in the case .

B. The Decision of the Court Below Conflicts with the Express Will of Congress that Waiver of the Right to Trial by Military Jury Must be Personally Invoked and, in Relying on "Substantial Compliance", the Decision Conflicts with this Court's Long-Standing Mandate Regarding Court-Martial Jurisdiction.

It is well-settled that military defendants at general courts-martial have an absolute right to trial by a jury composed of at least five military service members (usually officers), known as court members. 10 U.S.C. § 816, Article 16, UCMJ; United States v. MacCulloch, 40 M.J. 236, 239 (C.M.A. 1994); United States v. Sherrod, 26 M.J. 30, 32 (C.M.A. 1988). Although not a true jury of one's peers in terms of Sixth Amendment analysis, Congress' enactment of the right to trial by court members is the functional equivalent of the civilian jury,

serving the same purposes of impartiality, accuracy in fact-finding, and prevention of government oppression. Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968) (jury right "an inestimable safeguard against the corrupt overzealous prosecutor and against the compliant, biased, or eccentric judge . . . . [reflecting] a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.") Without question, "community participation" is viewed as critical to the accuracy and integrity of our criminal justice system. Id. *See also,* Schneckloth v. Bustamonte, 412 U.S. 218, 236 (1973) (constitutional protections afforded to criminal defendants are intended "to protect a fair trial and the reliability of the truth-determining process").

Military court members play a more active role in courts-martial than do their civilian counterparts, in that court members are allowed to (and frequently do) question witnesses, and may call witnesses to testify and otherwise obtain additional evidence. See, e.g., 10 U.S.C. § 846, Article 46, UCMJ. This participatory role enhances fact-finding in the criminal process, and exemplifies Congressional intent that military service members should enjoy at least as much, if not more, protection from prosecutorial oppression than ordinary citizens.

"The right to trial by jury has been so firmly engrained in our jurisprudence that the concept to waive it was not accepted until much more recent times." United States v. Butler, 14 M.J. 72, 76 (C.M.A. 1982)(Cook, J., dissenting). Indeed, no provision for trial by military judge alone existed until the Military Justice Act of 1968, Pub.L.No. 90-632, 82 Stat. 1335, which added Article 16(1)(B) to the UCMJ. United States v. Ward, 3 M.J. 365, 366 (C.M.A. 1977).

As currently written and applicable to the instant case, Article 16(1)(B) provides that a military accused may waive his right to trial by members only

> if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, requests orally on the record or in writing a court composed only of a military judge and the military judge approves; . . . .

Until the Court of Appeals for the Armed Forces' decision in this case, military courts (including the Navy-Marine Corps Court in this case) have consistently held to a strict construction of Article 16(1)(B), finding each subpart of Article 16(1)(B) to be a jurisdictional prerequisite to trial by military judge alone. United States v. Smith, 41 M.J. 817, 821-22 (N.M.Ct.Crim.App. 1995); United States v. Hussey, 1 M.J. 804, 806 (A.F.C.M.R. 1976). For example, prior to Article 16's amendment in 1983 allowing for an oral request, trial by military judge alone was found to be jurisdictionally defective in the absence of a written request signed by the accused. Del Prado v. United States, 23 C.M.A. 132, 48 C.M.R. 748 (1974); United States v. Dean, 20 C.M.A. 212, 43 C.M.R. 52 (1970). Jurisdictional defects were also found where the accused's written request for bench trial was made without knowledge of the identity of the judge (United States v. Rountree, 21 C.M.A. 62, 44 C.M.R. 116 (1971) and where the accused's signed written request came after presentation of some evidence (*i.e.*, after the court was assembled) (United States v. Nix, 21 C.M.A. 76, 44 C.M.R. 130 (1971)).

This long line of military jurisprudence which holds the provisions of Article 16(1)(B) to be jurisdictional prerequisites to trial by military judge alone, is rooted in this Honorable Court's long-standing mandate that, for jurisdiction to attach, the court-martial "must be convened and constituted in accordance with the law." McClaughry v. Deming, 186 U.S. 49, 62

(1902). As long ago as 1887, this Court described the fleeting and limited nature of court-martial jurisdiction:

> A court-martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose, and to perform a particular duty. When the object of its creation has been accomplished it is dissolved. . . . To give effect to its sentences, *it must appear affirmatively and unequivocally* that the court was legally constituted; that it had jurisdiction; that all statutory regulations governing its proceedings had been complied with; and that its sentence was conformable to law. *There are no presumptions in its favor* so far as these matters are concerned. . . . The facts necessary to show their jurisdiction, and their sentences were conformable to law, must be stated positively; and *it is not enough that they may be inferred argumentatively*.

Runkle v. United States, 122 U.S. 543, 555-56 (1887) (emphasis added). This narrow jurisdiction is important because a military defendant sacrifices important constitutional rights upon entering the military service, such as the right to trial by a randomly-selected jury of his or her peers. O'Callahan v. Parker, 395 U.S. 258, 261 (1969), *overruled on other grounds*, Solorio v. United States, 483 U.S. 435 (1987).

Accordingly, in 1970 the Court of Military Appeals (now the Court of Appeals for the Armed Forces) held in Dean that it was "not free to alter a plain requirement of the law," and recognized that

> Courts established under Article III of the Constitution are in existence and retain their jurisdiction, irrespective of whether a defendant waives his right to a trial by jury. But a military court's jurisdiction does not exist unless the court is created in accordance with the statute authorizing it.

43 C.M.R. 54-55. In determining that an oral request made personally by the accused on the record did not satisfy then Article 16's requirement for a written request, the Dean court found the subsequent trial by military judge alone to be without jurisdiction. "Without compliance with the provisions of Article 16 . . ., a court composed of a military judge alone is not lawfully constituted as a court." Id.

Although Dean was decided before Article 16 was amended in 1983 to allow for oral requests, nothing in the amended language supports the Court of Appeals for the Armed Forces' sudden conclusion that a personal request by the accused is no longer required. As the Navy-Marine Corps Court found in this case, the legislative history behind the 1983 amendment is "particularly instructive" to the contrary:

> Section 3(a) amends Article 16(1)(B) to permit an oral request for trial by judge alone. At present, trial by judge alone is authorized only upon written request. The requirement for a written request . . . creates the possibility of administrative error even if **the accused** on the record makes a knowing, voluntary, oral choice for trial before a specific judge . . . Nothing in this amendment modifies . . . the military judge's responsibility to determine that **the accused** understands the options and that **the accused** has had an adequate

> opportunity to consult with counsel about the choice. Likewise, the amendment does not affect the military judge's responsibility to ensure that the accused has made a knowing, voluntary request if the accused elects to be tried by judge alone.

(Appendix B, *infra* at p. 17a (quoting S.Rep. No. 98-53, at 12 (1983) (emphasis added by the court; citation omitted).)

In its decision in the instant case, the Court of Appeals for the Armed Forces does not address this lengthy body of military and Supreme Court jurisprudence. The court cites only to a roundly criticized Illinois Supreme Court case[4] for its ultimate conclusion that "while there was a violation of Article 16, there has been substantial compliance in this case with that Article." (Appendix A, *infra* at p. 6a.) While holding that a personal request by an accused for trial by military judge alone is no longer a jurisdictional prerequisite,[5] the court

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[4] The holding in that case, People v. Sailor, 253 N.E.2d 397 (Ill. 1969) was criticized as "clearly alien to the explicit dictates of the [U.S.] Supreme Court". Baez v. Circuit Court of Cook County First Municipal District, 395 F.Supp. 1285, 1287 (Dist. of Ill. 1975). The Baez court relied, in part, on Schneckloth v. Bustamonte, 412 U.S. 218, 236 (1973), in which this Court held that, "To preserve the fairness of the trial process the Court established an appropriately heavy burden on the Government before waiver could be found --- 'an intentional relinquishment or abandonment of a known right or privilege.'" (quoting Johnson v. Zerbst, 304 U.S. 458, 462-64 (1938)).

[5] While noting that two months elapsed between the court session where the military judge explained to petitioner his right to a trial by members or military judge alone, the Armed Forces Court failed to address or acknowledge the significance of events occurring during this two-month period. Important motions were brought and the judge rendered findings seriously impacting the charges and the court-martial process, including a motion to dismiss based on the expiration of the statute of limitations. (R. 8-39) The pretrial rulings by the military judge impacted the tenor of the court-martial to such

--- without explanation ---has ignored the strict mandate of its own precedent and that of this Court. Perhaps most importantly, the court below ignored the will of Congress, as explicitly expressed in Article 16.

It is well-established that Congress has "plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline." Chappell v. Wallace, 462 U.S. 296, 301 (1983). This Court has admonished that, when faced with a due process question in a military context, courts must give particular deference to the balance struck by Congress in exercising its authority to regulate the military. Weiss v. United States, 510 U.S. 163, 176-78 (1994). "Judicial deference thus 'is at its apogee' when reviewing congressional decisionmaking in this area." Id. at 177 (quoting Rostker v. Goldberg, 453 U.S. 57, 67 (1981) . Where Congress has expressly determined what process is due to a military servicemember, the courts must adhere to that congressional mandate. Only under extraordinary circumstances where the Due Process Clause is deemed to require *more* protection to servicemembers than that afforded by Congress, may the courts override the balance struck by Congress. Weiss, 510 U.S. at 177-78. Because the lower court failed to strictly enforce the mandate expressed in Article 16, it has impermissibly substituted its due process determination for that of the Congress.

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an extent that the military judge should have ensured, at the next court-session, that the petitioner understood that the same judge who made those rulings would be deciding the merits of the case against him and that he still had the right to a trial by members. It was more imperative that petitioner understand his right to a trial by members at that point than at any other point in the court-martial process. Following the military judge's ruling on the statute of limitations issue, the most important decision left for petitioner was whether to be tried by members or military judge alone.

CONCLUSION

For the foregoing reasons, this Court should grant the instant petition in order to provide clear guidance to the federal circuits and military courts on these important, unsettled questions of law.

Respectfully submitted,

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March 1999

Appendix A

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

United States, Appellant

v.

Allan L. TURNER, Chief Warrant Officer
U. S. Navy, Appellee

No. 97-5002
Crim. App. No. 95-0904

Argued September 10, 1997

Decided September 30, 1997

Counsel:

For the Accused: Richard T. McNeil (argued); Mary Ramsay McCormick, Major Stephen D. Chace, USMC, and Lieutenant E.K. Rubiella, JAGC, USN (on brief); Commander Carol J. Cooper.

For the United States: Lieutenant Commander Nancy Blankenship Jones, JAGC, USN (argued); Colonel Charles Wm. Dorman, USMC, and Commander D.H. Myers, JAGC, USN (on brief).

Military Judge: T.P. Tielens

CRAWFORD, Judge:

Contrary to his pleas, the accused was convicted of sodomy (2 specifications), assault consummated by a battery (6 specifications), committing indecent acts with a child under the age of 16 (2 specifications), and attempting to impede an investigation, in violation of Articles 125, 128, and 134, Uniform Code of Military Justice, 10 USC §§ 925, 928, and 934, respectively. The convening authority approved the sentence of dismissal and 9 years' confinement. The Court of Criminal Appeals set aside the findings and sentence. 45 MJ 531. The following issues were certified by the Navy Judge Advocate General:

> I. WHETHER UNDER UCMJ ARTICLE 16, A COURT-MARTIAL HAS JURISDICTION OVER A CASE WHERE AN ACCUSED DOES NOT PERSONALLY REQUEST TRIAL BY MILITARY JUDGE ALONE EITHER IN WRITING OR ORALLY ON THE RECORD, BUT RATHER, THE REQUEST IS MADE BY THE ACCUSED'S TRIAL DEFENSE COUNSEL ON HIS BEHALF, IN WRITING, PRIOR TO TRIAL AND THEN ORALLY CONFIRMED BY THE TRIAL DEFENSE COUNSEL AT TRIAL, ON THE RECORD, IN THE PRESENCE OF THE ACCUSED.
>
> II. WHETHER A REQUEST FOR TRIAL BY MILITARY JUDGE ALONE MUST BE EXPRESSLY APPROVED ON THE RECORD BY THE MILITARY JUDGE, OR

CAN APPROVAL BE INFERRED FROM THE RECORD OF TRIAL.

III. IF CERTIFIED ISSUES I AND II ARE ANSWERED IN THE AFFIRMATIVE, DID THE NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS ERR IN HOLDING THAT: (1) THE REQUEST FOR TRIAL BY MILITARY JUDGE ALONE IN THIS CASE WAS INEFFECTIVE, DEPRIVING THE COURT-MARTIAL OF JURISDICTION AND (2) THAT THE MILITARY JUDGE NEVER PROPERLY APPROVED THE REQUEST FOR TRIAL BY MILITARY JUDGE ALONE.

The accused was advised by the judge of his forum choices. Subsequently, the accused's trial defense counsel made a written request for trial by judge alone. Trial defense counsel confirmed that request orally at trial while the accused was present. The accused did not object at trial and he has not objected or contradicted his counsel's representation to date. We hold that the court below erred in finding that the military judge had no jurisdiction to try the accused's court-martial. Under these facts, there was substantial compliance with Article 16, UCMJ, 10 USC § 816, and the error by the judge did not materially prejudice the substantial rights of the accused. Art. 59(a), UCMJ, 10 USC § 859(a).

FACTS

The military judge explained the accused's rights as follows:

> MJ: Warrant Officer Turner, you have the right to be tried by a court-martial composed of members.

If you are found guilty of an offense, the members would determine a sentence. Do you understand that right?

ACC: Yes, sir.

MJ: You're also advised that you may request to be tried by military judge alone. If your request is approved, the military judge would determine your guilt or innocence. If you are found guilty, the military judge would then determine your sentence. Do you understand that?

ACC: Yes, sir.

Although the accused discussed his choices of forum with his lawyer, he initially deferred making a decision. In a one- paragraph letter dated January 3, 1995, trial defense counsel made a written request for a judge-alone trial. The letter stated, "Please accept this as notice that the accused has authorized me to state that he will select judge-alone as the forum for the aforementioned case. CWO2 Turner has been advised of his rights to trial by members, and has knowingly, voluntarily and intelligently waived trial by members." This letter was signed by trial defense counsel but not the accused. Inquiry at trial consisted of the following:

MJ: Any other matters to add to the record at this time?

TC: Sir, I believe the defense has provided a written request for judge alone. Would you like to add that to the record or orally take care of that?

MJ: We can add that to the record.

TC: Judge, we can take care of that orally, if you prefer.

MJ: I have it, and I'll mark that Appellate Exhibit VII [sic]. Any other documents?

TC: No further documents.

DC: No, sir.

MJ: Lieutenant Seacrist, I take it from this request that the decision has been made to go judge alone?

DC: Yes, sir.

The court below, relying upon *United States v. Mayfield*, 43 MJ 766 (N.M.Ct.Crim.App. 1995), remanded, 45 MJ 176 (1996), held that failure of the accused personally to make a forum choice was a fatal jurisdictional defect and reversed. The lower court reasoned that *United States v. Dean*, 20 USCMA 212, 43 CMR 52 (1970), was still the law and concluded that it was bound by it. 45 MJ at 533-34.

DISCUSSION

Article 16, in effect at the time of the accused's trial, provided in part:

> The three kinds of courts-martial in each of the armed forces are—
> (1) general courts-martial, consisting of—
> (A) a military judge and not less than five members; or
> (B) only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after

> consultation with defense counsel, requests orally on the record or in writing a court composed only of a military judge and the military judge approves[.]

The history behind Article 16 is set forth in *Mayfield*, 45 MJ at 177-78. Part of the impetus for Article 16 is *Patton v. United States*, 281 U.S. 276 (1930). In *Patton*, the Supreme Court emphasized the need for the "express and intelligent consent of the defendant" to trial by the judge. *Id.* at 312. Courts will not presume waiver based on a silent record. *Id.* at 311-12.

Patton was the impetus for Fed.R.Crim.P. 23, the civilian counterpart of Article 16. Fed.R.Crim.P. 23(a) requires trial by jury "unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government." Fed.R.Crim.P. 23(b) requires written agreement of the parties for a jury of less than 12 members. Prevailing federal practice is to treat the requirement for written waivers under both 23(a) and 23(b) as procedural requirements. Where the record reflects that the defendant understands his rights and desires either to waive a jury or to consent to a jury of less than 12 members, failure to reduce the waiver to writing is regarded as a nonjurisdictional procedural error. *See United States v. Fisher*, 912 F.2d 728 (4th Cir. 1990); *United States v. Saadya*, 750 F.2d 1419 (9th Cir. 1985); *United States v. Page*, 661 F.2d 1080 (5th Cir. 1981); *United States v. Ricks*, 475 F.2d 1326 (DC Cir. 1973); *Rogers v. United States*, 319 F.2d 5 (7th Cir. 1963).

Article 16 guarantees the right to a trial by court members. *See United States v. MacCulloch*, 40 MJ 236, 239 (CMA 1994). Other rights to be decided personally by an accused include the type of plea to make, the right to testify in his or her own behalf, the right to be present at trial, and the right to self-representation. *Id.*

The Uniform Code of Military Justice does not require that all these decisions be made on the record. However, a forum decision must be made "orally on the record or in writing." Because the accused in this case did not personally request a judge-alone trial, there was a violation of Article 16. However, we hold that this error does not require reversal of the accused's conviction.

At the accused's original Article 39(a), UCMJ, 10 USC § 839(a), session, the military judge explained his rights to a trial with members or a trial by judge alone. After this advice, the accused said that he had discussed the choices with his defense counsel and wanted to defer any action for a while. Two months later, trial defense counsel, acting on behalf of and in the presence of the accused, selected trial by judge alone. The accused did not object in any manner. He did not object at the time of the convening authority's action and has not contradicted his counsel's representation to this date. There is no allegation that the accused was coerced or was incompetent to make a knowing and intelligent waiver. Thus, while there was a violation of Article 16, there has been substantial compliance in this case with that Article. *People v. Sailor*, 253 N.E.2d 397, 399 (Ill. 1969).

The record of trial as a whole makes clear that the selection was the accused's choice, and that the error -- obtaining the oral statement of selection of the forum from counsel rather than the accused -- did not materially prejudice the substantial rights of the accused. Art. 59(a). However, we expect military judges to inform accused persons, on the record, of their right to trial by courts-martial and to trial by judge alone, and to obtain from the accused either an oral waiver on the record or a written waiver pursuant to Article 16.

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is set aside, and the record of trial is returned to the Judge Advocate General of the Navy for remand to that court for further review.

Chief Judge COX and Judges GIERKE and EFFRON concur.

SULLIVAN, Judge (concurring in the result):

There was no violation of Article 16(b), Uniform Code of Military Justice, 10 USC § 816(b), in this case because the record shows substantial compliance with the requirements of that federal law. Common sense must prevail. As the majority states, "The history behind Article 16 is set forth in [*United States v.*] *Mayfield*, 45 MJ [176,] 177-78 [(1996).]" ___ MJ ___, (6). The history behind *Mayfield* is the case law of *United States v. Yates*, 28 MJ 60 (CMA 1989), and *United States v. Jette*, 25 MJ 16 (CMA 1987). These three cases decide the matter at bar. Article 16 has been substantially complied with in this case.

APPENDIX B

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

BEFORE

T.D. KEATING E.D. CLARK JOHN T. OLIVER

UNITED STATES

v.

Allan L. TURNER
Chief Warrant Officer 2 (W-2), U.S. Navy

NMCM 95 00904 Decided 10 December 1996

Sentence adjudged 10 January 1995. Military Judge: T.P. Tielens. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Chief of Naval Education and Training, Pensacola, FL.

RICHARD T. McNEIL, Civilian Defense Counsel
MARY RAMSAY McCORMICK, Civilian Defense Counsel
Maj David S. JONAS, USMC, Appellate Defense Counsel

LCDR N.B. JONES, JAGC, USN, Appellate Government Counsel

OLIVER, Judge:

A general court-martial, consisting of military judge alone, convicted appellant, contrary to his pleas, of numerous offenses of sodomy, assault, indecent acts, and attempting to impede an investigation. His sentence

included 9 years confinement and dismissal from the naval service. The convening authority approved the sentence. In addition to the six assignments of error appellate counsel raised,[1] this Court specified the following additional issue:

> DOES THE ABSENCE OF AN ORAL REQUEST ON THE RECORD OR A WRITTEN REQUEST SIGNED PERSONALLY BY THE ACCUSED FOR TRIAL BY MILITARY JUDGE ALONE CONSTITUTE JURISDICTIONAL ERROR? *See United States v. Mayfield*, 43 M.J. 766 (N.M.Ct.Crim.App. 1995); Article 16, UCMJ; R.C.M. 903(b)(2).

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[1] I: THE MILITARY JUDGE ERRED IN ALLOWING, OVER VIGOROUS DEFENSE OBJECTION, THE TRIAL COUNSEL TO ELICIT TESTIMONY OF UNCHARGED MISCONDUCT TO PROVE SIMILA CONDUCT OCCURRED ON THE CHARGED DATES.

II. THE GOVERNMENT FAILED TO PROVE BEYOND A REASONABLE DOUBT APPELLANT'S GUILT TO ALL CONTESTED OFFENSES.

III. APPELLANT WAS WRONGFULLY CONVICTED OF ASSAULT FOR CONDUCT WHICH MEETS THE DEFINITION OF JUSTIFIABLE PARENTAL DISCIPLINE.

IV. THE MILITARY JUDGE ERRED IN FINDING THAT AMENDMENTS MADE TO THE CHARGES AND SPECIFICATIONS WERE NOT MAJOR CHANGES.

V. TRIAL DEFENSE COUNSEL PROVIDED INEFFECTIVE REPRESENTATION BY NOT INTRODUCING, ON THE MERITS, EVIDENCE OF APPELLANT'S OUTSTANDING MILITARY RECORD.

VI. A SENTENCE OF CONFINEMENT FOR NINE YEARS AND A DISMISSAL IS INAPPROPRIATELY SEVERE.

The parties agree that the record contains neither a written request the accused signed for trial by military judge alone nor an oral request he made personally on the record to the same effect.[2] There is also, we note, no record of the military judge *approved* any such request. Because we conclude that this general court-martial never properly acquired jurisdiction to try this

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[2] The entire colloquy bearing on this issue is as follows:

TC: Sir, I believe the defense has provided a written request for judge alone. Would you like to add that to the record or orally take care of that?

MJ: We can add that to the record.

TC: Judge, we can take care of that orally, if you prefer.

MJ: I have it, and I'll mark that Appellate Exhibit VII [sic]. Any other documents?

TC: No further documents.

MJ: Lieutenant Seacrist, I take it from this request that the decision has been made to go judge alone?

DC: Yes sir.

Record at 40. The "written request for judge alone," which was appended to the record as Appellate Exhibit VIII, was a one-paragraph letter, dated 3 January 1995, from the defense counsel to the trial counsel which read: "1. Please accept this as notice that the accused has authorized me to state that he will select judge-alone as the forum for the aforementioned case. CWO2 Turner has been advised of his rights to trial by members, and has knowingly, voluntarily and intelligently waived trial by members." Trial defense counsel signed this correspondence; however, the appellant did not.

We note that the military judge had explained to the appellant his rights related to the composition of his court-martial at a preliminary session on 4 November 1994. Record at 4-5. The appellant and his counsel deferred making a choice. *Id.* at 5.

case, we need not address the other assignments of error at this time.

Article 16(1) of the Uniform Code of Military Justice, 10 U.S.C. § 816 (1994) [hereinafter UCMJ], provides that statutory requirement for properly convening a general court-martial. A general court-martial consists of "a military judge and not less than five members . . . ." Article 16(1)(A), UCMJ. However, the statute also permits a general court-martial to consist of "only a military judge, if before the court is assembled *the accused*, knowing the identity of the military judge and after consultation with defense counsel, requests *orally on the record* or in writing a court composed only of a military judge and the military judge approves. . . ." Article 16(1)(B), UCMJ (emphasis added). We believe that this language unambiguously requires the accused to personally select trial by military judge alone, whether it be "orally on the record or in writing." *Id.*

A court composed of a military judge alone is not a court-martial without strict compliance with Article 16, UCMJ. In United Sates v. Dean, 10 C.M.A. 212, 43 C.M.R. 52, 55, 1970 WL 7427 (1970), the Court of Military Appeals held: "Without compliance with the provisions of Article 16 . . ., a court composed of a military judge alone is not lawfully constituted as a court." *See also United States v. Mayfield*, 43 M.J. 766, 769 (N.M.Ct.Crim.App. 1995), *set aside on other grounds*, No. 96-5002 (Sept. 27, 1996).

The *Dean* Court considered the Government's position that there was no indication that the choice in the case "was not intelligent or voluntary," that there was no "prejudice to the accused," and that demanding compliance with the specific requirements of the statute would be "an insistence on a meaningless ritual or the elevation of form over substance." *Dean*, 43 C.M.R. at

55. However, our superior court was unpersuaded. Relying on Supreme Court precedent, a majority of the *Dean* Court concluded that they were "not free to alter a plain requirement of the law." It reversed the decision of the lower court, set aside the findings of guilty and the sentence, and returned the record for a possible new trial. *Id.*

We note, of course, that *Dean* was decided before the 1983 amendment to Article 16, UCMJ. At that time, the only way for a military judge sitting alone to acquire jurisdiction was to have the accused personally sign a written request. The problem in *Dean* was that, although the accused personally requested a judge-alone trial orally on the record, he and his counsel failed to submit a written request which the accused had signed. However, the opinion retains precedential value for its holding that strict compliance with the statute is essential for the court-martial to be "lawfully constituted." *Dean*, 43 C.M.R. at 55. In *United States v. Mayfield*, No. 96-5002, slip op. at 7-8, the Court of Appeals for the Armed Forces set aside the decision of this Court which held that a post-trial session, at which the accused personally confirmed is desire for a judge alone trial, was insufficient to meet the requirements of Article 16, UCMJ. At the same time the Mayfield Court "reject[ed] the invitation to overrule *United States v. Dean.*" *Mayfield*, No. 96-5002, slip op. at 7.

Having the accused personally make his request as to the composition of the court-martial on the record or in writing is not a "meaningless ritual." *Dean*, 43 C.M.R. at 55. Rather, it is the only way for the military judge sitting alone to obtain jurisdiction. Strict compliance with jurisdictional requirements for courts-martial is a long-standing mandate. As far back as 1887 the Supreme Court observed:

A court martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose and to perform a particular duty. When the object of its creation has been accomplished it is dissolved. . . . To give effect to its sentences it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings had been complied with, and that its sentence was conformable to law. . . . There are no presumptions in its favor so far as these matters are concerned.

United States v. Runkle, 122 U.S. 543, 555-56, 7 S.Ct. 1141, 1146, 30 L.Ed. 1167 (1887) (citations omitted). *See McClaughry v. Deming*, 186 U.S. 49, 65-66, 22 S.Ct. 786, 792-93, 46 L.Ed. 1049 (1902).

The Government relies on Rule for Courts-Martial 903(b)(2) for the proposition that counsel may enter the request as to the composition of the court-martial on behalf of his client: "A request for trial by military judge alone shall be in writing and signed by the accused or shall be made orally on the record." Rules for Courts-Martial 903(b)(2), Manual for Courts-Martial, United States (1995 ed.) [hereinafter R.C.M.]. By including the phrase "by the accused" in the written option while not including that phrase in the oral option, the Government argues that the President, in promulgating R.C.M. 903(b)(2), intended for either the accused, or counsel acting on his behalf, to make the oral request. *See* R.C.M. 502(d)(6), Discussion B ("Defense counsel must explain to the accused: the elections available as to composition of the court-martial and assist the accused to make any request necessary to effect the election . . . ."); R.C.M. 903(a)(2). We do not agree.

While the Rules for Courts-Martial provide important procedural guidelines for practitioners, the substantive law, binding upon us, is that which the Congress and the Courts have promulgated. *See United States v. Johnson*, 25 M.J. 878, 884 (N.M.C.M.R. 1988). In *United States v. Ware*, 1 M.J. 282 (C.M.A. 1976), the Court of Military Appeals (now the Court of Appeals for the Armed Forces) made this clear: "[T]he President's power, under Article 36, UCMJ, to prescribe procedural guidelines before courts-martial is limited to rules not contrary to or inconsistent with the Code . . . " *Id.* at 285 (footnotes omitted). Article 16 requires the accused to request trial by judge alone personally on the record. An oral request by counsel on his behalf is not sufficient. *See Mayfield*, 43 M.J. at 770 ("Requests by counsel do not suffice").

The Government argues that our decision in *Mayfield* went too far and that, although the accused must personally sign a written request, counsel may make an oral request on his client's behalf. We think that both law and logic support this Court's conclusion in *Mayfield* that Article 16 requires "the accused to request trial by military judge alone *personally* on the record after consulting with defense counsel." Mayfield, 43 M.J. at 770 (emphasis added). Therefore, we now specifically adopt the reasoning in *Mayfield* and apply it, along with the unambiguous language of Article 16 and the holding of our superior court in *Dean*, as the law in this case.[3]

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[3] We are aware that our superior court recently set aside our decision in *Mayfield*, ___M.J. at ___. We are also aware that they opined: "Any error in this case was in the technical application of the statutory rules and was not a matter of substance leading to jurisdictional error." However, the holding in *Mayfield* is easily distinguishable from the case before us. Unlike *Mayfield*, there was never any post-trial session at which the accused personally confirmed his choice of being tried before a judge alone. Moreover, the *Mayfield* Court held "that there was no jurisdictional error" and

When asked during oral argument for additional authority for the proposition that the trial defense counsel can select the composition of the court-martial on behalf of his client, the Government could cite no cases. (We note that, other than the above language in *Mayfield*, the appellant was equally unable to cite any case authority for the contrary conclusion.) Instead, the Government referred to the Discussion following R.C.M. 903(c)(2)(A): "Ordinarily the military judge should inquire personally of the accused to ensure that the accused's waiver of the right to trial by members is knowing and understanding. Failure to do so is not error, however, where such knowledge and understanding otherwise appear on the record." The Analysis of R.C.M. 903(c) states: "[This subsection] does not require an inquiry of the accused by the military judge, although . . . it is good practice to do so, and failure to do so could be error if the record otherwise left the accused's understanding of the rights in doubt." MCM, App. 21, at A21-50 (citations omitted).

While the Discussion and Analysis contained in the Manual are usually helpful in understanding the applicable Rule and the substantive law, if this language is taken to mean that the military judge need not obtain an oral request for trial by judge-alone from the accused personally, it is incorrect and misleading. But we believe this is not what the drafters intended by this language. Rather, we believe the drafters were referring to the recommended practice of explaining to the accused, on the record, his rights as to the possible compositions of the court-martial, in some detail, to ensure his full understanding.

"reject[ed] the invitation to overrule *United States v. Dean* . . . ." *Mayfield*, No. 96-5002, slip op. at 7.

The authorities cited immediately following this part of the Analysis buttress our conclusion in this respect. *See, e.g., United States v. Turner*, 20 C.M.A. 167, 43 C.M.R. 7, 1970 WL 7413 (1970); *United States v. Jenkins*, 20 C.M.A. 112, 42 C.M.R. 304, 1970 WL 7079 (1970). Of the authorities cited, the legislative history behind the 1983 amendment of Article 16 is particularly instructive:

> *Section 3(a)* amends Article 16(1)(B) to permit an oral request for trial by judge alone. At present, trial by judge alone is authorized only upon written request. The requirement for a written request . . . creates the possibility of administrative error even if **the accused** on the record makes a knowing, voluntary, oral choice for trial before a specific judge. . . . Nothing in this amendment modifies . . . the military judge's responsibility to determine that **the accused** understands the options and that **the accused** has had an adequate opportunity to consult with counsel about he choice. Likewise, the amendment does not affect the military judge's responsibility to ensure that the accused has made a knowing, voluntary request if the accused elects to be tried by judge alone. *See United States v. Parkes*, 5 M.J. 489 ([C.M.A.] 19[78]).

S.Rep. No. 98-53, at 12 (1983) (emphasis added).

The Analysis of R.C.M. 903(c) also cites the Court of Military Appeals decision in *Parkes*. MCM, App. 21, at A21-50. In *Parkes* (as in *Turner* and *Jenkins*), the appellant complained that the military judge had failed to adequately assure himself that he had "understandingly" made his request for military judge alone. *Parkes*, 5 M.J. at 490. The military judge had asked a series of questions of the appellant personally to assure himself

that he indeed understood the differences and wanted to be tried by judge alone. *Id.* at 490 nn. 2-4 (and accompanying text). However, while the inquiry could have been more thorough, there was no jurisdictional defect of the sort present in this case because the accused had personally signed the written request to be triad by judge alone.

In 1987 this Court reviewed the import of the language in the Discussion following R.C.M. 903(c). *United States v. Pettaway*, 24 M.J. 589 (N.M.C.M.R.) (per curiam), *petition denied*, 25 M.J. 483 (C.M.A. 1987). In *Pettaway* the military judge had failed to fully advise the accused of his rights with respect to the composition of the court-martial. While criticizing this failure, this Court found o prejudicial error, much less any jurisdictional defect, and affirmed his conviction . Id. at 591. The critical distinction in *Pettaway* was that the appellant ended up having his case tried before a court-martial composed of officer members. *Id.* Therefore, the general court-martial which tried his case had direct jurisdiction under Article 16(a)(A), UCMJ. Under such circumstances, the military judge had no mandatory responsibility to obtain the accused's review of each alternative; the guidance in the Discussion to inform him of all of his options was merely advisory.[4]

The Government further argues that the trial defense counsel undertakes various critical trial evolutions on behalf of his client. For example, he or she normally enters pleas on behalf of the accused. *See*

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[4] There was a *Dubay* hearing in *Pettaway* which established that appellant's detailed defense counsel had "extensively informed" him of his rights with respect to the composition of his court-martial. *Pettaway*, 24 M.J. at 591. We will not speculate what the Court of Appeals for the Armed Forces would have done had this information been unavailable.

MCM, at A8-5; R.C.M. 910.[5] However, if the accused elects to plead guilty, the military judge must make a comprehensive factual inquiry into the accused's personal understanding of the offense(s) to which the plea was made. *United States v. Care*, 18 C.M.A. 535, 40 C.M.R. 247, 1969 WL 6059 (1969). As we all know, the Care inquiry requires a significant interchange directly with the accused, verifying that he or she in fact wants to plead guilty and that the facts support this decision. *Id.* 40 C.M.R. at 253-54. *See also* R.C.M. 910(c)(1)-(5).

Other trial evolutions which a counsel routinely performs on behalf of his client, such as arguing motions, conducting *voir dire*, objecting to evidence, or examining witnesses, all require the professional abilities of a trained lawyer. And, of course, none of them implicates a fundamental jurisdictional requirement of the court-martial itself.

As an independent defect in the court-composition selection process in the case before us, we note that the military judge never expressly **approved** a request by the accused in any form for trial by judge alone. A request for trial by judge alone is not operative when the accused makes it, but rather only on approval by the military judge. *United States v. Morris*, 23 C.M.A. 319, 324, 49 C.M.R. 653, 658, 1975 WL 15885 (1975) (providing that the jurisdiction of a judge-alone court-martial exists only when the accused requests and "the military judge approves" such request).

The Government argues that the military judge tacitly approved the appellant's attorney's request to

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[5] This is probably because entering please, especially when pleading guilty by exceptions and substitutions, can be a complicated task.

proceed to trial by military judge alone. While we have little doubt that all the participants were in agreement as to the composition of this court-martial, we conclude that any **implied** approval to proceed to trial by judge alone was an insufficient substitute for the military judge **expressly** stating that he has approved the accused's request on the record. *See United States v. Runkle*, 122 U.S. 543, 7 S.Ct. 1141, 30 L.Ed. 1167 (1887) ("There are no presumptions in [a court-martial's] favor so far as jurisdiction is concerned . . . . 'It is not sufficient that jurisdiction may be inferred. . . .'"). *Id.* at 556, 7 S.Ct. at 1146 (quoting *Brown v. Keene*, 33 U.S. [8 Pet.] 112 115, 8 L.Ed. 885 (1834) (per Marshall, C.J.)).

Finally, having found that the process was defective, we must consider the appropriate remedy. As in *Dean*, we do not believe there was any prejudice to the appellant as a result of the defects in the process by which the court failed to acquire jurisdiction. *Dean*, 43 C.M.R. at 55. Indeed, we are convinced that all the parties acquiesced. However, as the Supreme Court observed in *Deming*, "[appellant's] consent could no more give jurisdiction to this court-martial . . . than if it were composed of a like number of civilians. . . ." *Deming*, 186 U.S. at 66, 22 S.Ct. at 793. *See* Article 66(c),(d), UCMJ; *Dean*, 43 C.M.R. at 55. *See also United States v. Smith*, 41 M.J 817, 820-21 (C.M.Ct.Crim.App. 1995), and the cases cited therein.

Since the court-martial was never properly constituted, we need not examine whether or not there was plain error, *see United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed. 2d 508 (1993), or concern ourselves with whether the appellant suffered actual prejudice as a result. It is well settled that the only appropriate remedy for a fatal jurisdictional defect on appeal is to set aside the findings and sentence. *Deming*, 186 U.S. at 69-70, 22 S.Ct.at 794 (holding that

a jurisdictional defect is fatal to the effect of the court-martial). As our superior court concluded when faced with a similar jurisdictional defect in *United States v. Ryan*, 5 M.J. 97, 101-02 (C.M.A. 1978): "As a fundamental defect existed . . . there was no court at all. Accordingly, reversal is compelled. . . . The findings and sentence [must be] set aside."[6]

For the reasons discussed above, we hold that the military judge had no jurisdiction to try this general court-martial. Accordingly, the findings and sentence are set aside. The same or a different convening authority may order a rehearing.

Senior Judge KEATING and Senior Judge CLARK concur.

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[6] If Congress wants to amend Article 16 to permit counsel to select the composition of the court-martial on behalf of the accused, it certainly has the power to do so. However, based on our experience, we do not view this as a recurring or systemic problem. Our trial judges simply need to follow the language of the appropriate trial guide to ensure that each court-martial is properly constituted.

Appendix C

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, Appellee	)	USCA Dkt. No. 97-5002/NA Crim.App. No. 95-0904
v.	)	
	)	ORDER
Allan L. TURNER, Appellant	)	

On consideration of appellant's petition for reconsideration of the opinion of the Court issued on September 30, 1997, it is, by the Court, this 13th day of November, 1997,

ORDERED:

That said petition is hereby denied.

For the Court,

/s/ Thomas F. Granahan
Clerk of the Court

Appendix D

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, Appellee	)	USCA Dkt. No. 98-0702/NA
	)	Crim.App. No. 95-0904
v.	)	
	)	ORDER DENYING PETITION
Allan L. Turner (300-50-2450), Appellant	)	

On consideration of the petition for grant of review of the decision of the United States Navy-Marine Corps Court of Criminal Appeals, it is by the Court this 23rd day of September, 1998,

ORDERED:

That said petition be, and the same is hereby denied.

For the Court,

/s/ Thomas F. Granahan
Clerk of the Court

Appendix E

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, Appellee	)	USCA Dkt. No. 98-0702/NA
	)	Crim.App. No. 95-0904
v.	)	
	)	ORDER
Allan L. Turner (300-50-2450), Appellant	)	

On consideration of appellant's motion for leave to file petition for reconsideration out of time, it is, by the Court, this 14th day of January, 1999,

ORDERED:

That said motion is hereby denied.

For the Court,

/s/ Thomas F. Granahan
Clerk of the Court